

UNITED STATES OF AMERICA

v.

OMAR AHMED KHADR

Defense Motion

For Reconsideration of the Commission's
Ruling on D-060

20 August 2008

1. **Timeliness:** This motion for reconsideration is filed within the timeframe established by R.M.C. 905.

2. **Relief requested:** The defense respectfully requests the Military Commission to reconsider its ruling of 20 June 2008, denying the defense motion to compel production of Analyst Support Packages (ASPs), D-060.¹

3. **Burdens of proof and persuasion:** The instant motion follows in the wake of the defense motion to dismiss based on unlawful influence stemming from, *inter alia*, apparent interference with the discovery process by persons within the Department of Defense (DoD) General Counsel's office. (*See* Def. Mot. to Dismiss, D-072.) This interference resulted in the defense not being afforded the opportunity to introduce evidence from the Schmidt-Furlow report in support of its motion to compel production of the ASPs. (*See id.* at 2-3.) Accordingly, the burden on this motion for reconsideration is properly on the *government* to demonstrate beyond a reasonable doubt that the requested ASPs are not "material to the preparation of the defense" within the meaning of R.M.C. 701(c). *See United States v. Lewis*, 63 M.J. 405, 413 (C.A.A.F. 2006).

4. **Facts:**

a. The factual background to the defense motion to compel production of the ASPs is set forth (as completely as can be in light of the classified nature of the requested materials) in the original motion, D-060.

b. On 19 June 2008, oral argument was conducted in connection with the motion. Prior to argument, the defense specifically informed the Military Judge of its desire to submit matters from the Schmidt-Furlow report in support of the motion and requested to defer argument accordingly. The defense also requested to orally expand the motion to encompass the companion IPs. (Transcript unavailable.)

¹ In the course of argument on the motion, the defense orally expanded the scope of the request to encompass the companion "Interrogation Plans" (IPs). (Transcript unavailable.) While the prosecution has tentatively agreed to produce the IPs, it has not yet done so. The defense respectfully requests the Military Commission to order their production as well in disposing of the present motion.

c. The Military Judge elected to proceed with argument notwithstanding the defense request. On 20 June 2008, the Military Commission issued its ruling on the defense motion, denying production of the ASPs. (*See* Ruling on D-060.)

5. Law and argument: The Military Commission should reconsider its ruling of 20 June 2008 and order production of the ASPs.

a. R.M.C. 905(g) provides that “the military judge may, prior to authentication of the record of trial, reconsider any ruling . . . made by the military judge.” Here, reconsideration is appropriate based upon consideration of previously unavailable evidence, and as part of an effort to cure the taint resulting from actual unlawful influence over the professional judgment of trial counsel in these proceedings.

b. The arguments in support of the original defense motion are set forth therein and need not be repeated at length here. (*See* Def. Mot. to Compel, D-060, at 2-3.) Suffice to say that the reliability of Mr. Khadr’s purported statements to government interrogators continues to be and will remain the central issue in this case (both in connection with pretrial proceedings and, if Mr. Khadr’s statements are deemed admissible, at trial). Attachment A is a “Research Plan” prepared by Dr. Lawrence Steinberg, the defense’s approved expert on the subject of juvenile false confessions on or about 29 July 2008. In identifying the matters to which Dr. Steinberg must be afforded access in order to thoroughly evaluate the reliability of Mr. Khadr’s alleged statements, Dr. Steinberg specifically cites “any background information provided to the interrogators in advance of the interrogation session.” (Dr. Steinberg Research Plan, ¶ 3 (Attachment A).)

c. As shown by portions of the “Tiger Team SOP” (Attachment B), this is precisely the type of information contained in the ASPs and IPs, and therefore critical to the preparation of the defense.² The ASPs and IPs are described in the Tiger Team SOP. Additional details concerning the ASPs and IPs are contained in classified portions of that document and cannot be discussed herein, however, the Military Judge will have the opportunity to review these materials. Such review will confirm that ASPs and IPs contain information interrogators would have relied upon to frame subsequent interrogations of Mr. Khadr. They likely show what interrogators would have assumed true for purposes of determining whether Mr. Khadr was being cooperative or uncooperative with his interrogators. This is significant because evidence suggests that interrogators imposed consequences if they felt Mr. Khadr was being uncooperative.

d. Based upon the foregoing, it is almost beyond question that the ASPs and IPs are “material to the preparation of the defense” within the meaning of R.M.C. 701(c). *See, e.g., United States v. Gaddis*, 877 F.2d 605, 611 (7th Cir.1989) (defining material evidence as evidence that would “significantly help [] in ‘uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal’”) (quoting *United States v. Felt*, 491 F.Supp. 179, 186 (D.D.C.1979)). During argument on the original motion, the

² The classified attachment will be provided to the Military Judge in connection with the next scheduled session of the Military Commission (currently scheduled for 10 September 2008).

prosecution appeared to conflate the issue of materiality with the question of whether the ASPs and IPs are entitled to some form of protection in view of their classified status. This confusion of issues is a potential source of error. The ASPs and IPs are not somehow more or less “material” depending whether or not they are classified. They either fall within the very broad concept of materiality or they do not. Here, as a likely source of admissible evidence, they clearly do. If material and *classified*, the government has a choice – it can either produce the documents to defense counsel, who possess appropriate security clearance, or it can invoke the national security privilege and avail itself of the procedures specified in MCA § 949j and M.C.R.E. 505. The answer is not, as suggested by the government, for the documents to be produced to neither the defense nor the military judge, and for the government to be left to decide for itself what classified information the *government* thinks will be helpful to the defense and must therefore be disclosed. Accordingly, the Military Commission should grant the instant motion and require the government to make its election.

6. **Oral Argument:** The Defense requests oral argument in connection with this motion pursuant to R.M.C. 905(h).

7. **Witnesses and evidence:**

Attachments A and B

8. **Certificate of conference:** The prosecution opposes the requested relief.

9. **Additional Information:** In making this motion, or any other motion, Mr. Khadr does not waive any of his objections to the jurisdiction, legitimacy, and/or authority of this Military Commission to charge him, try him, and/or adjudicate any aspect of his conduct or detention. Nor does he waive his rights to pursue any and all of his rights and remedies in and all appropriate forms.

10. **Attachments:**

A. Dr. Lawrence Steinberg Research Plan of 29 July 2008

B. Excerpted portion of Tiger Team SOP

/s/

William C. Kuebler
LCDR, JAGC, USN
Detailed Defense Counsel

Rebecca S. Snyder
Assistant Detailed Defense Counsel

UNITED STATES OF AMERICA

v.

**OMAR AHMED KHADR
a/k/a “Akhbar Farhad”
a/k/a “Akhbar Farnad”
a/k/a “Ahmed Muhammed Khali”**

D079

GOVERNMENT’S RESPONSE

**To the Defense Motion for Reconsideration
of the Commission’s Ruling on D-060
(Analyst Support Packages)**

3 September 2008

- 1. Timeliness:** This motion is filed within the timelines established by Military Commissions Trial Judiciary Rule of Court 3(6)(b) and the Military Judge’s Trial Schedule of 19 June 2008.
- 2. Relief Requested:** The Government respectfully submits that the Defense’s motion to reconsider the Commission’s ruling on D-060 (Analyst Support Packages) should be denied. Similarly, the Defense’s expanded request for Interrogation Plans (IPs) should be denied.
- 3. Burden and Persuasion:** As the moving party, the Defense bears the burden of establishing, by a preponderance of the evidence, that it is entitled to the requested relief. *See* Rules for Military Commissions (“RMC”) 905(c)(1), 905(c)(2)(A). The military judge did not hear argument or rule on the Defense Motion to Dismiss, D-072, relating to “apparent interference.” The only basis for the Defense claim of interference is its own motion. As such the burden in this instance remains with the moving party, the Defense.
- 4. Facts:**
 - a. The Prosecution has reviewed two Analyst Support Packages and numerous interrogation plans related to the accused in this case. The Prosecution has also requested that JTF-GTMO confirm that the Prosecution has all relevant ASP’s and IPs and will be able to review any additional responsive documents prior to the 10 September hearing.
 - b. The Government has previously described the general nature and content of ASPs at the 19 June 2008 hearing. Although the very nature of ASPs tends to preclude their relevance to these proceedings, the Government will continue its diligent efforts and review any forthcoming ASPs and IPs to determine whether or not they are relevant and material to the Defense. The Government plans on informing the Defense if information contained in these documents was not already produced to the Defense in some form, or is otherwise relevant and material.
 - c. On 20 June 2008, the Military Judge denied the Defense Motion to Compel production of ASPs.

5. Discussion:

a. THE FACTS HAVE NOT CHANGED THE LEGAL ANALYSIS OF THE MILITARY JUDGE'S RULING ON D-060.

i. The premise of the current request for reconsideration is false. The Defense argues that the facts underlying its motion to dismiss, D-060, have changed to such an extent that the dramatic step of reconsidering the Military Judge's previous ruling is required. The Defense does not argue that the legal standard has changed, therefore the Government incorporates the "Discussion" section of its response to D-060 in full for the purposes of this response. *See* Gov. Response to D-060 at 2-11.

ii. The Defense argues that it did not have access to certain information at the previous hearing and therefore was unable to fully articulate the relevance of the ASPs and IPs. However, no part of the Schmidt-Furlow Report – all of which has been disclosed to the Defense with the exception of one exhibit – changes the very nature of ASPs. They are derivative information. Any information contained in the ASPs reviewed by the Prosecution is cumulative and has been previously provided to the Defense in some form. This information provides the basis of the ASPs, and is a much better source of material for case preparation. The fact that the ASPs are documents that are derived from reports the Defense already possesses means it is information they do not need to prepare its case. This is the very definition of immateriality.

iii. While it is clear that the Defense does not need ASPs to prepare its case, it also does not have a need to know. The organization of the information contained in ASPs, much of which is classified, clearly demonstrates the importance the U.S. Government places on certain information, and more importantly, the way certain information is gathered. This is not helpful or necessary to the preparation of the Defense, and, in fact, could cause grave harm to the United States if even inadvertently released to unauthorized persons.

iv. The argument that these materials are needed by the Defense expert, Dr. Steinberg, similarly does not change the propriety of denying production of the ASPs. As mentioned above, the Defense already possesses the underlying reports which form the basis of ASPs. Also, any report generated by a law enforcement interview of the accused, the specific dates of those interviews, the name of the interviewing agent, and notes taken by those agents have been provided to the Defense. As demonstrated in Major Groharing's e-mail to all parties sent at 1704hrs, 29 August 2008, the Defense has been on notice for some time as to when, where, and by whom interviews of the accused were conducted, specifically as they relate to potential Government witnesses. The previous disclosure of all relevant, and some arguably not relevant, materials relating to interviews of the accused wholly undermines the Defense's claimed need of the ASPs.

v. The Defense attempts to bootstrap its arguments in D-072, Defense Motion to Dismiss, in the present request for reconsideration. As noted above, the Military Judge did not hear oral argument, nor did he make a ruling on D-072. As such, the Commission should not consider the following language: "as part of an effort to cure

the taint resulting from actual unlawful influence over the professional judgment of trial counsel in these proceedings.” *See* Def. Mot., D-079 at 2. The only ruling relevant to the underlying request is the Military Judge’s ruling on D-060, denying the Defense request to compel production of ASPs. Without a significant change in fact or law, that ruling must stand.

vi. Should the Military Judge require *in camera* review of the documents in question, the Prosecution will be prepared to provide them for the Military Judge’s review at GTMO prior to the hearing on 10 September 2008. By then the Prosecution will have reviewed any additional documents provided by JTF-GTMO, in the event such documents exist. Should there be information in these additional ASPs not previously provided to the Defense, the Prosecution will inform the Defense of these ASPs and whether they are relevant and material for purposes of discovery.

b. CONCLUSION

i. The Defense has no right to ASPs under the MCA or MMC. The discovery provisions of the MCA and MMC are robust and fair. As stated in the Government’s Response to D-060, “The Defense will have every opportunity to challenge the statements of the accused by filing motions to suppress, providing evidence and oral argument in support of such motions, and by cross-examining personnel who interviewed the accused and will testify at trial. With these tools available to the Defense in representing their client, there will be no harm to the accused by denying the present request for ASPs.” Gov. Resp. to D-060 at 4. For these reasons, the Defense request for reconsideration should be denied.

6. Oral Argument: Should the Military Judge order the parties to present oral argument, the Government is prepared to do so.

7. Witnesses and Evidence: All of the evidence and testimony necessary to deny this motion is already in the record.

8. Certificate of Conference: N/A.

9. Additional Information: None.

10. Submitted by:

Jeffrey D. Groharing
Major, U.S. Marine Corps
Prosecutor

//s//

Keith A. Petty
Captain, U.S. Army
Assistant Prosecutor

John F. Murphy
Assistant Prosecutor
Assistant U.S. Attorney

Jordan Goldstein
Assistant Prosecutor
Department of Justice

UNITED STATES OF AMERICA

v.


OMAR AHMED KHADR
a/k/a "Akhbar Farhad"
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RULING FOR D-079

**Defense Motion
for Reconsideration of the
Commission's Ruling on D-060**

1. The Defense requests the Commission to reconsider its ruling of 20 June 2008 denying the defense motion to compel production of Analyst Support Packages (ASPs), D-060. The Government opposes this motion.
2. The Defense has provided no new information in support of this motion to reconsider a prior ruling. In spite of that, the Commission will reconsider its prior ruling.
3. The Government has provided the Defense with any statements the accused may have made during the course of interviews or interrogations of the accused. The Defense has access to those individuals who conducted the interviews or interrogations. Subsequent to the 10 September 2008 hearing on this motion, the Government disclosed 51 interrogation plans to the defense counsel on 17 September 2008 (see 17 September 2008 email from CPT Petty). The Defense still has not sufficiently demonstrated how knowing what the interviewers or interrogators thought was important and how they may have developed strategies for future interviews or interrogations are material for the preparation of the defense.
4. The Commission adheres to its prior analysis and ruling on this matter. Therefore, motion to compel production of the ASPs is DENIED.

So Ordered this 7th day of October 2008.


Patrick J. Parrish
COL, JA
Military Judge